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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIANA PESQUEIRA,

Defendant and Appellant.

D061510

(Super. Ct. No. SCN 278369;
SCN 297168)

APPEAL from a judgment of the Superior Court of San Diego County,
Kimberlee A. Lagotta, Judge. Affirmed as modified.

Adriana Pesqueira appeals a judgment arising out of her 2011 guilty plea¹ to one count of possession of methamphetamine for sale and the resulting revocation of her probation on two counts of furnishing controlled substances to which she pled guilty in

¹ (*People v. Pesqueira* (Super. Ct. San Diego County, 2011, No. 278369.) (No. 278369.)

2010.² She contends in part that the trial court (1) violated the constitutional prohibition against the ex post facto application of a law by awarding her less than day-for-day custody credits against her sentence and (2) improperly imposed a \$240 restitution fine, which she contends was duplicative of the restitution fine the court imposed when it placed her on probation in 2010.

The Attorney General concedes that Pesqueira is entitled to day-for-day credits and agrees that the abstract of judgment erroneously sets forth the \$240 fine. She contends, however, that the error was not imposing the fine, but in specifying its amount (\$240 rather than \$800) and the Penal Code section it was imposed under (§ 1202.4, subd. (b), rather than § 1202.44). (All further statutory references are to this code.) We modify the judgment to award Pesqueira 52 days of additional custody credits and correct the fines imposed and we affirm the judgment as so modified.

FACTUAL AND PROCEDURAL BACKGROUND

Pesqueira was charged with multiple drug-related offenses in August 2010 (No. 297168). She pled guilty to two counts of furnishing a controlled substance in exchange for a dismissal of the remaining charges. The following month, the court sentenced her to three years of formal probation and 365 days in local custody and imposed several fines, including an \$800 restitution fine under section 1202.4, subdivision (b), and a suspended \$800 probation revocation restitution fine under section 1202.44.

² (*People v. Pesqueira* (Super. Ct. San Diego County, 2010, No. 297168.) (No. 297168.)

After being released on probation, Pesqueira was arrested for possessing methamphetamine for sale on September 28, 2011 (No. 278369). In November 2011, she pled guilty to the possession count in exchange for a stipulated three-year split sentence, with the final year to be served on supervised probation, and admitted violating her probation on the 2010 offenses.

The superior court revoked Pesqueira's probation and sentenced her for both the 2010 and 2011 offenses on January 9, 2012, imposing the agreed upon three-year split sentence for the 2011 offense and a concurrent two year term for the 2010 offenses, both to be served in the county jail in accordance with the Criminal Justice Realignment Act of 2011 (the Act). (Stats. 2011, 1st Ex. Sess. 2011–2012, ch. 12, § 1, codified at § 1170, subd. (h).) The court awarded Pesqueira 156 days of presentence custody credits (comprised of 104 actual days served plus 52 days of credits under Penal Code section 4019) as to the 2011 offense, and 569 days of credits (comprised of 285 days of actual time served and 284 days of conduct credits) for the 2010 offenses. The court imposed a \$600 restitution fine as to the 2011 offense and a \$240 restitution fine as to the 2010 offenses. Pesqueira appeals.

DISCUSSION

1. *Custody Credits*

In October 2009, the Legislature passed Senate Bill No. 18. Among other changes, it amended section 4019 to increase the presentence custody and conduct credits that certain eligible defendants could earn, from two days of conduct credits for every four days of actual custody to two days of conduct credit for every two days of actual

custody. This statutory change became effective January 25, 2010. (Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 50.)

In September 2010, the Legislature passed Senate Bill No. 76, which again amended section 4019. Under this legislation, qualifying defendants who committed crimes on or after September 28, 2010 were eligible for conduct credits at a reduced rate of two days for every four days of actual custody time. (§ 4019, subds. (b), (c) & (g); Stats. 2010, ch. 426, §§ 1, 2.) The legislation also amended section 2933 to provide that "[n]otwithstanding Section 4019 . . . , a prisoner sentenced to the state prison under Section 1170 . . . shall have one day deducted from his or her period of confinement for every day he or she served in county jail . . . from the date . . . of arrest until state prison credits pursuant to this article are applicable to [him or her]." (Former § 2933, subd. (e)(1).) Pursuant to these provisions, a defendant who was sentenced to local custody was only entitled to credits under section 4019, while a defendant who was ultimately sentenced to prison would be entitled to the more beneficial credits under section 2933, subdivision (e)(1).

In April 2011, the Governor signed the Act, which drastically changed the sentencing options available to trial courts by allowing them to sentence defendants convicted of certain felonies, including Pesqueira's current offense, to county jail rather than state prison. (§ 1170, subd. (h).) The Act amended the provision of section 4019 regarding the accrual of conduct credits, so that qualifying defendants who committed crimes after October 1, 2011, were entitled to earn two days of credit for every two days served in custody. (§ 4019, subds. (f) & (h).) It specified, however, that "[a]ny days

earned by a prisoner prior to October 1, 2011," would continue to be calculated "at the rate required by the prior law." (§ 4019, subd. (h).) The Act also deleted section 2933, subdivision (e)(1)'s provision for day-for-day presentence credits against a prison sentence. (Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 16.)

The overall effect of the changes wrought by the Act was a reduction of the conduct credits that accrued for qualifying defendants (like Pesqueira) who committed their crimes between September 28, 2010, and October 1, 2011, and were sentenced to county jail rather than prison.³ Pesqueira contends, and the Attorney General properly agrees, that such an application of the Act would violate the constitutional prohibition against ex post facto laws because it had the effect of changing "the legal consequences of acts completed before its effective date," i.e., the credits to which Pesqueira was entitled based on her earlier, pre-sentence conduct. (*Weaver v. Graham* (1981) 450 U.S. 24, 31, 36; *Dobbert v. Florida* (1977) 432 U.S. 282, 293-294.) To avoid such an

³ On the day Pesqueira committed the current offense (September 28, 2011), the law provided that a defendant who committed a qualifying crime was entitled to day-for-day conduct credits for presentence time served in jail if sentenced to prison, but only one day of conduct credits for every two days actually served if sentenced to jail. (Former § 4019, subds. (f), (g); former § 2933, subd. (e)(1).) Under the Act, a defendant who committed a crime after October 1, 2011 was entitled to day-for-day conduct credits against his or her sentence, regardless of whether the sentence was to be served in prison or jail. (§ 4019, subd. (f); Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 16 [deleting § 2933].) Because Pesqueira committed her current offense prior to October 2, 2011 and was sentenced to local custody, the court calculated her credits under the former statutory scheme, awarding her one day of conduct credit for every two days that she served in county jail between her arrest and sentencing.

unconstitutional application of the Act, Pesqueira must be awarded 52 days of additional custody credits.⁴

2. *Restitution Fines*

Section 1202.4, subdivision (b), requires the trial court to impose a restitution fine "[i]n every case where a person is convicted of a crime" unless the court finds compelling and extraordinary reasons for not doing so. If the court grants the defendant probation, it must make the payment of the restitution fine a condition of probation. (§ 1202.4, subd. (m).)

In addition to the section 1202.4, subdivision (b), restitution fine, the court is required to impose a probation revocation restitution fine at the same time and in the same amount as the restitution fine, but stay its effectiveness unless and until the defendant's probation is later revoked. (§ 1202.44; *People v. Guiffre* (2008) 167 Cal.App.4th 430, 434.) As its name suggests, this probation revocation restitution fine becomes effective upon the revocation of probation and the court has no authority to waive or reduce it "absent compelling and extraordinary reasons stated on [the] record." (§ 1202.44; *People v. Cropsey* (2010) 184 Cal.App.4th 961, 966.)

Here, in placing Pesqueira on probation for the 2010 offenses, the court imposed a restitution fine of \$800 and an \$800 probation revocation restitution fine, suspended unless probation was later revoked. In 2012, when Pesqueira was sentenced for the 2011

⁴ Based on this conclusion, we do not reach Pesqueira's alternative argument that the trial court's application of the statutes violated her constitutional right to equal protection under the law.

offense, the court revoked her probation on the 2010 offenses, thus triggering the effectiveness of the suspended 2010 \$800 fine. Unfortunately, however, the court announced that it was imposing a second restitution fine of \$240 as to the 2010 offenses, rather than declaring that the previously suspended \$800 probation revocation restitution fine had become effective. As the court had no authority to impose a second restitution fine or to waive or reduce the \$800 revocation fine without making the requisite findings, we modify the abstract of judgment.

DISPOSITION

The judgment is modified by increasing Pesqueira's custody credits by 52 days as to the 2011 offense, striking the \$240 restitution fine imposed as to the 2010 offense and noting that the \$800 probation revocation restitution fine imposed but suspended in 2010 has now become effective. As modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

NARES, J.

WE CONCUR:

BENKE, Acting P.J.

McDONALD, J.